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IN THE

Supreme Court of the United States

October Term, 1959.

No. 518

NATHAN L. POSNER, ESQUIRE and S. JEROME EPSTEIN, Executors for the Estate of Abraham Epstein, Deceased,

Petitioners,

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

NATHAN L. POSNER,
J. VICTOR O'BRIEN,
FOX, ROTHSCHILD, O'BRIEN & FRANKEL,
10th Floor, 1301 Walnut Street,
Philadelphia 2, Pennsylvania,
Attorneys for Petitioners.

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IN THE

Supreme Court of the United States.

October Term, 1959.

No.

NATHAN L. POSNER, ESQUIRE, AND S. JEROME EPSTEIN, EXECUTORS FOR THE ESTATE OF ABRAHAM EPSTEIN, DECEASED,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on August 12, 1959.

OPINIONS BELOW.

The opinions of the District Court appear in the appellant's appendix in the Court of Appeals at pages 118a and 126a. The opinion of the Court of Appeals appears in the appendix attached to this petition.

JURISDICTION.

Judgment of the Court of Appeals was entered on August 12, 1959. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), Act of June 25, 1948, c. 646, 62 Stat. 928.

QUESTIONS PRESENTED.

1. Under the provisions of 40 U.S.C. § 489 (b) (2) may the government recover from any person who participates in a fraudulent scheme in violation of subsection (b) of that Act, or is subsection (b) (2) limited in application to the person who agreed to give consideration to the government?

2. In attempting to prove a violation of 40 U.S.C. § 489 (b) by a person who is dead at the time of trial is the government required to produce evidence which establishes fraud beyond a reasonable doubt?

3. Did the present action abate upon the death of the original defendant or is the Act of June 25, 1948, 62 Stat. 971, 28 U.S.C. § 2404 applicable to cause the action to survive and be enforceable against his estate?

STATUTES INVOLVED.

28 U.S.C. § 2404, Act of June 25, 1948, 62 Stat. 971:

> "A civil action for damages commenced by or on behalf of the United States or in which it is interested shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants."

40 U.S.C. § 489, Act of June 30, 1949, c. 288, Title II, Sec. 209, 63 Stat. 392:

> ". . .
>
> (b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agree-

ment, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or devise, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property under this chapter, chapter 11B of Title 5, chapter 4 of Title 41 and chapter 11 of Title 44—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be."

STATEMENT OF THE CASE.

The complaint of the United States in this case was filed in the District Court for the Eastern District of Pennsylvania on December 29, 1953 and amended on March 31, 1955. As amended it alleged that the original defendant, Abraham Epstein, who died on October 3, 1956, and whose executors were substituted as defendants before trial, joined with a war veteran, Jack Grollman, in a fraudulent scheme involving the improper use of Grollman's veteran's preference to obtain for Epstein and two corporations controlled by him surplus paper products which the Government had made available for sale. The Government sought to recover an amount equal to twice the consideration involved in the various transactions under the Surplus Property Act, 63 Stat. 392, 40 U.S.C. § 489 (b) (2).

Trial without jury was held before the Honorable Francis L. Van Dusen on May 22-24, 1957. On July 23, 1958 judgment was entered in favor of the United States and against the substituted defendants in the amount of $15,844.46, which constituted twice the consideration paid to the government for surplus paper products in a series of transactions by Grollman in the Fall of 1946. The basis for this finding by the trial judge was his conclusion that the purchases had been made pursuant to a fraudulent scheme between Epstein and Grollman whereby Epstein, or the Regal Corrugated Box Company, a corporation controlled by Epstein, actually profited by the transactions. The trial judge also found, however, that as to a series of purchases of surplus paper products beginning December 30, 1946 and ending February 15, 1947 there was no scheme to defraud and ordered judgment for the defendants on this part of the Government's claim. The Court found, as to these latter transactions, that Epstein and Grollman had changed their method of doing business upon advice of counsel and that Grollman was substantially interested in the ownership and profits of the enterprise.

Cross-appeals were promptly filed by both parties in the Court of Appeals for the Third Circuit, which affirmed the judgments of the District Court on August 12, 1959. It is from the affirmance of the judgment in favor of the United States against the substituted defendants that your petitioners now respectfully invoke the review of this Court.

REASONS FOR GRANTING THE WRIT.

1. In deciding that 40 U.S.C. 489, subsection (b) (2), is applicable to any person who participates in a fraudulent scheme in violation of subsection (b), and is not limited in application to the person who agreed to give consideration to the government, the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

2. In deciding that clear and convincing evidence is sufficient to sustain a finding of fraud upon the part of a person who is dead at the time of trial the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court which require proof "beyond a reasonable doubt".

3. In deciding that the present action did not abate on the death of the original defendant the Court of Appeals decided that 40 U.S.C. 489, subsection (b) (2), provides for a "civil action for damages" within the intendment of 28 U.S.C. § 2404. This is an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT.

The Court of Appeals, in the present case, affirmed a judgment against the estate of a decedent for alleged fraudulent conduct even though the only evidence supporting such a finding was adduced through the decedent's alleged co-conspirator who testified, without fear of contradiction from the decedent, as to his recollection of transactions which had taken place over ten years previously. The trial judge found in favor of the Government as to approximately one-half of the purchases involved and in favor of the defendants as to the balance of the transactions.

The decision of the trial judge, and the subsequent affirmance by the Court of Appeals, necessarily involved a consideration and a determination of three important federal questions, two of which have never been presented to or decided by the Supreme Court or any other Court of Appeals. It is respectfully submitted that the court below decided those questions incorrectly and, in addition, acted in conflict with applicable decisions of the Supreme Court in failing to require a sufficiently high standard of proof.

1. Interpretation of Subsection (b) (2).

The Court of Appeals interpreted subsection (b) (2) of 40 U.S.C. 489 as being applicable to any participant in a fraudulent scheme in violation of subsection (b). The tenuous manner in which the Court reached this conclusion is demonstrated by the following portion of its opinion:

> "A separate point is made that subsection 489 (b) (2) of Title 40, as quoted above, expressly limits the United States to the recovery of twice the consideration moving to or from 'such person'. It is then argued that 'such person' means the person who is to be held liable.' But careful reading of the first sentence of subsection (b) seems to us to indicate that 'such person' as

used in the subsection (2) means, in relation to the language of subsection (b), 'any person' who gets government property. At the same time liability is imposed not merely on 'any person' who gets government property by fraud, but more broadly, on 'every person' who participates in the fraudulent scheme."

It is conceded that "every person" who participates in a fraudulent scheme may be held liable under subsections (b) (1) and (b) (3). But, by its unambiguous terms, subsection (b) (2) applies only to those participants who *agreed* to give consideration to the government.

The meaning of subsection (b) (2) with regard to this limitation on its scope has never been considered by the Supreme Court or by any other Court of Appeals. This is obviously an important question of federal law which should be settled by this Court. Whatever may have been the legislative intent, the plain language of the subsection makes it inapplicable to those participants who did not enter into an agreement with the government, and this language cannot be ignored or lightly cast aside. Whether or not the Court of Appeals could or would have supported its conclusion on a theory of agency (in the absence of supporting evidence) its actual holding is based upon the erroneous interpretation of the subsection quoted above.

2. The Degree of Proof Required.

It is apparent from a reading of the opinion of the Court of Appeals in the present case that it did not require the Government to prove its case "beyond a reasonable doubt" but only "by clear and convincing evidence". In refusing to apply the stricter rule the Court below decided a federal question in a way in conflict with applicable decisions of the Supreme Court.

The rule of this Court was first stated in *Prevost v. Gratz*, 1821, 6 Wheat. 481, 498, 5 L. Ed. 311, 315:

> "Fraud, or breach of trust, ought not lightly to be imputed to the living; for, the legal presumption is the other way; and as for the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave unless the evidence of fraud be clear, beyond a reasonable doubt."

No Supreme Court case has been found in which this just and reasonable rule has been modified. It should not have been ignored by the Court of Appeals.

3. The Question of Abatement.

Since the decision of this Court in *Rex Trailer Co. v. United States*, 1956, 350 U.S. 148, it has been well settled that a proceeding under 40 U.S.C. § 489(b)(1) is civil in nature and that a prior criminal conviction for the same offense does not prevent a recovery under that subsection. In *Koller et al. v. United States*, 1959, 359 U.S. 309, this Court held that proceedings under subsection (b) (1) are not "actions . . . for the enforcement of any civil fine, penalty or forfeiture . . ." as required by 28 U.S.C. § 2462 in providing a five year statute of limitations.

The question of whether or not a proceeding under 40 U.S.C. § 489 (b) (2) is a "civil action for damages" within the intendment of 28 U.S.C. § 2404 which provides for the survival of such actions against the estate of a deceased defendant has not been considered by this Court or by any Court of Appeals.

While this Court, in the *Rex Trailer* case, merely said that subsection (b)·(1) does not impose criminal penalties; it went further in the *Koller* case and held, in effect, that that subsection does not impose a "civil fine, penalty or forfeiture." Subsection (b) (2), however, does not limit the remedy to $2,000 per transaction, but only to an amount equal to twice the consideration agreed to be paid. Thus,

in a case involving five purchases of surplus property for a total consideration of $500,000, if the government elected to proceed under subsection (b) (1) it could collect only $10,000 while $1,000,000 could be collected under subsection (b) (2).

Liquidated damage provisions are traditionally regarded as penalties when they are unreasonable. The imposition of a sanction equal to twice the consideration paid has no reasonable relationship to the injury suffered by the government. Even if the costs of prosecution (which remain relatively constant irrespective of the amount involved) are included as an element of damage, the unreasonableness of the remedy is obvious.

The legislative background of 28 U.S.C. § 780a, the predecessor of Section 2404, as reported and discussed in *Porter v. Montgomery*, 1947, C.A. 3, 163 F. 2d 211, furnishes a clear indication that simple actions for damages, and not provisions imposing sanctions of the type here involved, were contemplated by Congress in providing for the survival of "civil actions for damages" in Section 2404.

CONCLUSION.

For the foregoing reasons we respectfully urge that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

NATHAN L. POSNER,
J. VICTOR O'BRIEN,
Attorneys for Petitioners.

Of Counsel:

FOX, ROTHSCHILD, O'BRIEN & FRANKEL.

Appendix.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 12,752

No. 12,753

UNITED STATES OF AMERICA

v.

NATHAN L. POSNER, ESQUIRE, AND S. JEROME EPSTEIN, EXECUTORS OF THE ESTATE OF ABRAHAM EPSTEIN, DECEASED,

Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 1, 1959

Before: GOODRICH, KALODNER and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 12, 1959)

By HASTIE, *Circuit Judge.*

The complaint of the United States in this case alleges that the original defendant, Abraham Epstein, who died and whose executors were substituted as defendants before trial, joined with a war veteran, Jack Grollman in a fraudulent scheme involving the improper use of Grollman's veteran's preference to obtain for Epstein and two corporations controlled by him surplus property which the government had made available for sale. Invoking a civil

remedy provided by the Surplus Property Act, 63 STAT. 392, 40 U.S.C. § 489, the government recovered double the consideration involved in one transaction and was denied recovery in another. Cross appeals followed.

Concerning government property alleged to have been acquired for transfer to Regal Corrugated Box Co., one of the Epstein controlled corporations, there was evidence that Epstein suggested to Jack Grollman, one of his employees, that Grollman obtain a veteran's preference certificate and use it to purchase certain lithography and paper products from the War Assets Administration. There was also evidence that Epstein and Grollman understood before the purchases in suit were made that the property to be acquired was intended for use in the business of Regal. Pursuant to this plan Epstein assisted and directed Grollman in the preparation and execution of an application for a veteran's priority certificate. In that application there appear statements, which Epstein knew to be false, that Grollman was the proprietor of a business at a stated address with a stated number of employees.

Epstein then used his standing and credit to obtain a bank loan, loans from Regal and other financing to provide the money needed for the purchase of surplus property in the name of Grollman. Beyond that Epstein actually selected the property to be purchased. Grollman then went through the procedures of buying the surplus paper products in his own name and reselling the merchandise to Regal at a price, determined by Epstein, which was substantially in excess of the government selling price.

Regal paid this resale price to Grollman who, at Epstein's direction, retained a percentage of the resale profit to be used to pay income tax on the gain. The amount of the profit after taxes was then paid to Epstein by the device of drawing and cashing Grollman's checks payable to "cash" and delivering the currency to Epstein. Thus, the evidence indicated, as the district court found, that it was not Grollman but Epstein and Regal who were the principal parties and beneficiaries in this series of transactions.

The statute under which this suit has been brought reads as follows:

> "(b) Every person who shall . . . enter into an agreement, combination, or conspiracy to use . . . any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any payment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer, or disposition of property under this chapter, ..."
>
> ". . . . . .
>
> "(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be; . . . ." 40 U.S.C. § 489 (b) (2)

In terms of this statute the district court quite properly viewed the evidence as clearly disclosing Epstein as the initiator, principal actor and principal beneficiary of a scheme to obtain government property and dispose of it at a profit to himself through falsely representing that a veteran was purchasing the property in his own interest. As we read the evidence, it is strongly persuasive that Grollman was simply not buying and reselling government property on his own account, but was merely an agent, controlled and directed by Epstein, purchasing and reselling in Epstein's interest while using quite transparent procedures to set up a merely colorable proprietorship of a veteran. For under the transaction as disclosed in the record there appears to have been no time at which Epstein did not direct and control every significant step in the enterprise. Add the fact that the resale profits after estimated taxes were surrendered to Epstein and it seems entirely clear that he was the principal and the real party in interest.

A separate point is made that subsection 489 (b) (2) of Title 40, as quoted above, expressly limits the United States to the recovery of twice the consideration moving to or from "such person". It is then argued that "such person" means the person who is to be held liable. But careful reading of the first sentence of subsection (b) seems to us to indicate that "such person" as used in the subsection (2) means, in relation to the language of subsection (b), "any person" who gets government property. At the same time liability is imposed not merely on "any person" who gets government property by fraud, but more broadly, on "every person" who participates in the fraudulent scheme. Even if we should be wrong in this analysis we would still have no difficulty in supporting the conclusion that it was Epstein through his agent Grollman who, within the meaning of the statute, received the property in suit from the government and resold it at a profit to Regal.

To avoid the conclusion reached by the court below as to the true nature of the transactions in suit, the appellants argue that the finding that the profits on the resale to Regal were turned over to Epstein was based on the inadmissible hearsay and, therefore, improper. But Grollman himself testified:

> ". . . The balance of the profit, [after setting aside a sum for taxes] was to be given back to Mr. Epstein—was given back to Mr. Epstein in the form of various and several checks drawn to the order of cash.
>
> ". . . . .
>
> ". . . Either I would cash them or someone else would cash them, and the actual cash was given to Mr. Epstein."

Here we have a direct statement of relevant facts and events offered as matter within the knowledge of the witness. Had his testimony on direct or cross-examination indicated that he was merely repeating what someone else had told him, a hearsay problem would have been presented.

But nothing of that sort appears. On the record the testimony was unquestionably competent.

One other point merits mention. Defendant Epstein died before trial and this action has been defended by his executors. They urge that the proceeding is quasi-criminal and, therefore, that it abated upon the death of Epstein. The government relies upon the provision of the Act of June 25, 1948, 62 STAT. 971, 28 U.S.C. § 2404 that "[a] civil action for damages commenced by or on behalf of the United States or in which it is interested shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants."

Since *United States v. Doman*, 3d Cir. 1958, 255 F.2d 865, *aff'd* per curiam *sub nom. Koller, et al. v. United States*, 1959, 359 U.S. 309, we think there can be no doubt but that this proceeding is properly classified as a civil action for a remedy of compensatory nature which does not abate. *Cf. Rex Trailer Co. v. United States*, 1956, 350 U.S. 148; *United States v. Grannis*, 4th Cir. 1949, 172 F.2d 507.

In addition to the paper purchased for the ultimate use of Regal which is the subject of the foregoing discussion, other paper products were purchased in the name of Grollman and resold to Allied Shipping Supply Co. The district court found no violation of Section 489 (b) (2) in this transaction and the government has appealed.

We have examined the evidence concerning this transaction. We agree with the court below that there was significant evidence indicating a major beneficial interest of Grollman himself in this transaction and in the gain which resulted from it. It is conceded that in this suit where fraud is an essential element of the claim, the government must prove its case by clear and convincing evidence. After a reasoned and proper evaluation of the evidence the district court as trier of fact did not find the showing clear and convincing that Grollman was merely an agent, as distinguished from a proprietor with a major interest in the

purchase followed by resale to Allied Shipping Supply Co. We find no justification for disturbing this conclusion.

The judgment will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 12,752
No. 12,753

UNITED STATES OF AMERICA,
Appellant in 12,752,

v.

NATHAN L. POSNER, Esquire, and S. JEROME EPSTEIN, Executors of the Estate of ABRAHAM EPSTEIN, Deceased,
Appellants in 12,753.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Present: Goodrich, Kalodner, and Hastie, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

Harriet G. Humphreys,
Chief Deputy Clerk.

August 12, 1959